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note that workplace drug tests don't measure whether someone is high at the time of the test, just whether they've used recently. And they say workplace drug testing is an ...

Mar. 02, 2022



Thirty-seven states now allow adults to use marijuana medically, recreationally or both. But in most of those states, people can be fired or denied a job for using cannabis in their free time.

Cannabis legalization advocates want states to do more to protect workers. They

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So far, 14 states and Washington, D.C., have banned employers from discriminating against workers who use marijuana for medical reasons. New Jersey and New York ban employers from discriminating against workers who legally use marijuana medically or recreationally. And Nevada bans employers from refusing to hire someone solely because they fail a marijuana test. The laws generally make exceptions for certain employers and occupations.

But bills have stumbled elsewhere because of opposition from business groups and disagreements over how to measure marijuana intoxication. A bill filed in Washington state this session already has been tabled. A California bill faces an uphill battle. And, in light of opposition, a Colorado bill will be softened to studying the issue.

The initial version of the Colorado bill would have affirmed the right of medical marijuana patients to use cannabis products at work and would have prevented employers from firing or refusing to hire workers who use marijuana off the job.

It was always going to be a heavy lift: The bill raised legal questions—particularly about the medical marijuana provisions—since Colorado's 2012 ballot measure that legalized pot sales affirmed employers' right to restrict worker marijuana use.

Within two weeks of filing the bill in early February, state Rep. Edie Hooton, a Democrat, told Stateline she planned to scrap it. Instead, she'll propose that state officials convene employers, medical cannabis users and prescribers to study the workplace testing issue.

"I knew it was going to change," Hooton said of her initial bill, which she said was modeled on draft legislation backed by medical cannabis advocates in other states. "I

don't want to be in opposition with organized labor or employers, like the Chamber

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with marijuana in their systems.”

Colorado state Sen. Chris Holbert, a Republican who last year backed a law that allows school personnel to administer medical cannabis to children while they're in school, said employers should be able to drug test workers for marijuana if they choose. He emphasized that when Colorado voters legalized pot, they wrote that authority into the state constitution.

But employers should make an informed decision, he added. “What I really encourage employers to understand is, if they're testing for drug use, then what is the test or those tests looking for?”

If employers are worried about someone coming to work high, he said, they should be asking whether workplace drug tests measure that—and whether, for instance, they also penalize employees for using non-psychoactive cannabis products, such as a hemp extract.

To test, or not to test?

Federal contractors and businesses that employ certain regulated professionals such as airline pilots and school bus drivers must drug test workers for marijuana. Other employers have a choice. They might decide to drug test workers as part of a job application, randomly, after an accident, if they suspect a worker is intoxicated, or in all four situations.

Today most of the nation's largest private-sector companies have some sort of drug testing program, said Barry Sample, senior science consultant for employer solutions at Quest Diagnostics, a global laboratory company that processes workplace drug tests for employers.

Of the tests Quest Diagnostics processes that aren't federally required, Sample said,

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executives have said that the growing number of states legalizing marijuana, equity concerns and the tight labor market all factored into their decision.

"We've found that eliminating pre-employment testing for cannabis allows us to expand our applicant pool," Beth Galetti, Amazon's senior vice president of human resources, said in a January memo posted online.

Dropping marijuana tests allows employers to consider hiring and retaining the small but growing share of applicants who use the drug. Nationwide, 4.4% of workers failed tests Quest Diagnostics processed in 2020, up from 3.5% in 2012. The rate was slightly higher, 4.8%, in states that allow adults to buy recreational marijuana.

"It's not surprising that in our testing we're seeing year-over-year increases in marijuana positivity," Sample said. "Clearly, societal views on marijuana use are evolving."

Companies' ongoing struggles to recruit and retain workers may encourage more of them to drop marijuana tests, said Melissa Moore, director of civil systems reform at the Drug Policy Alliance, a national nonprofit that advocates for ending punitive drug laws.

"During the labor crunch right now, some employers are taking a look at: Is this something that's not actually accomplishing the goal of workplace safety?" she said.

Employers may be unnecessarily blocking people from certain positions, Moore said.

She also noted that a 2013 Yale School of Medicine study found that Black and Hispanic workers were more likely than White workers to be employed by a workplace that requires drug testing.

“Let’s make sure we’re not putting up artificial roadblocks that end up impacting,

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National legal limit for whether someone has an unsafe level of psychoactive cannabis compounds in their body.

“No drug test, in urine, oral fluid or hair, measures impairment,” Sample said. “Just to set the record straight. None of these tests can tell you how much, how frequently, whether or not someone’s impaired. It just tells you that you have used it.”

Cannabis legalization advocates point out that cannabis compounds can linger in the body for weeks, if not months. That makes failing a marijuana drug test akin to failing a sobriety test because you had a glass of wine two weeks ago, said Moore, of the Drug Policy Alliance.

Meanwhile, employer groups say business owners should be able to maintain a drug-free workplace if they want.

The Colorado Restaurant Association’s primary concern with Hooton’s original bill was language allowing employees to use medical marijuana at work, said Mollie Steinemann, manager of government affairs for the association, in a phone interview.

Restaurants involve tight working spaces and hazards from knives to open flames and deep fryers, she said. Allowing workers to use intoxicating substances on the job could lead to accidents and potentially the loss of an establishment’s liquor license. The same goes for other intoxicating substances, including prescription drugs and alcohol, Steinemann added in an email to Stateline.

“What we’re concerned about is making it so that all employees, regardless of position, or regardless of potential risk within a restaurant, would just be allowed to use medical marijuana,” Steinemann said.

Sample, of Quest Diagnostics, argued that although workplace marijuana tests don't

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Nevada's 2019 law that stops employers from discriminating based on a pre-employment marijuana test, for instance, exempts candidates subject to federal drug testing and who, in the employer's view, are applying for jobs that could "adversely affect the safety of others."

Such exemptions led groups that previously opposed the legislation, such as the Las Vegas Metro Chamber of Commerce and the Nevada Trucking Association, to take a neutral stance on it instead.

Hooton, the Colorado state lawmaker, said past Colorado bills that aimed to protect cannabis users at work failed because sponsors didn't do enough to get employers, unions and other interest groups on board.

"You can't have a bill that significantly impacts employers without having them be central to the legislation," she said—unless they're doing something egregious. "This is absolutely nothing like that. This is: We need employers' feedback. We need their participation."

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